FILE COPY

FILED
MAR 19 192
CHARLES ELMORE CR
CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

Number 2, Original.

THE STATE OF NEW MEXICO, *Complainant,*

versus

THE STATE OF TEXAS, *Respondent.*

REPLY BRIEF IN SUPPORT OF COMPLAINANT'S PETITION FOR REHEARING.

FRANK W. CLANCY,
THORNTON HARDIE,
J. HARRY COVINGTON,
On Behalf of New Mexico.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

Number 2, Original.

THE STATE OF NEW MEXICO, *Complainant*,

versus

THE STATE OF TEXAS, *Respondent*.

REPLY BRIEF IN SUPPORT OF COMPLAINANT'S PETITION FOR REHEARING.

Position of Respondent on Subject of Application of Rules of Accretion to the Rio Grande Boundary.

The State of Texas in its brief in opposition to the petition for rehearing does not attempt to deny the contention of New Mexico that this Court was mistaken in announcing, in its opinion that from 1850 to 1911 the

United States and Texas had in surveying and granting lands "recognized and acquiesced in the line of the line of the river as it was located in 1850 when the Territory (of New Mexico) was created, as the boundary between the Territory and Texas, without reference to subsequent changes by accretions."

This mistaken assumption of fact was the basis of the decision of this Court in denying the applicability of the doctrine of accretion. (See Supplemental Brief of New Mexico on Petition for Rehearing, pp. 4-6.)

The true facts as shown by the record were quite the reverse of those stated on this subject by the Court. In the first place, along practically the entire boundary changes by accretion have always been recognized by Texas and the United States (See Brief, *supra*, pp. 6-14) and, secondly, the practical line which the Master found had been acquiesced in by the United States and Texas in almost its entire length coincides with the 1850 river line changed by accretions as found by him. (Brief, pp. 15-16.)

Texas in its brief in opposition to the petition for rehearing does not deny these contentions. Nor does Texas in the same brief deny the further contention of New Mexico (Brief, *supra*, pp. 17-20) that the Constitution of New Mexico, referred to by this Court, could not change the boundaries of Texas (certainly not adversely to Texas) as would be the case if the Constitution adopted the line found by this Court. This part of the opinion of this Court is bound up with the findings of fact referred to above.

The State of Texas rests its opposition to rehearing on the subject of accretion solely upon the contention that the pleadings do not raise any question of the applicability of that doctrine. This Court, in its opin-

ion, specifically refused to rest its decision on this narrow ground. We respectfully and earnestly submit that, if the pleadings be thought by this Court not properly to raise this question, both the record in this case and the rules of procedure applicable to controversies of this character should lead the Court to permit an amendment to the pleadings. In any event, so drastic a step as the decision of a boundary dispute between two States upon a point of pleading, with its resulting hardship to vested land titles, should not be taken without the fullest opportunity for the argument of this question of procedure.

The Record in This Case Makes an Amendment to the Pleadings, if Necessary, Equitable and Just.

We have already pointed out in the supplemental brief, *supra*, p. 3-4, that in December, 1923, the official interpretation placed upon the pleadings by the Attorney General of Texas was that the parties were agreed that the ordinary doctrine of accretion was applicable. This was also the view taken by the Special Master. (See Report, p. 79.) Prior to April 14, 1924, the State of New Mexico filed a motion to take certain additional testimony, the nature of which was set out in an affidavit attached to and made a part of the motion. (See Record, Additional Testimony, pp. 1-5.) This testimony, as appears from the affidavit, was to prove that certain alterations in the course of the river were "by gradual changes through accretion and not by avulsive changes." No objection to this motion was filed by the State of Texas.

On April 14, 1924, this Court granted the motion "limited to the subject matter detailed in his affidavits, dated November 26, 1923, and filed with the

motion," and this Court granted the State of Texas the right to introduce rebuttal testimony. (Record, Additional Testimony, p. 5.)

On May 5, 1924, the additional testimony permitted by this Court was taken and no objection was made by the State of Texas that the pleadings were not sufficient to admit proof on this issue. The only objection made by the State of Texas appears on page 14 of the Transcript of Additional Testimony as follows:

> "Q. 60. Mr. Owen, from your examinations, on the ground, in past years, and your present surveys up there, are you able to state whether or not the river changed, from its position in 1852, as shown on this map, by avulsion or accretion?
>
> Mr. W. W. Turney: Do not answer yet. We want to make this objection to that question, and any answer to it. That it has not been shown, as yet, that the river claimed to be the river of 1925, at the point indicated, and adjacent to the country club district, actually came from the river of 1852, or the location of the river of 1852, either by avulsion, or accretion; and, second, the witness has not qualified as an expert on the question of avulsion or accretion. It is plain that the witness did not see the changes in the river, from his testimony now given, and that heretofore given; and, to ask the witness to give an expert opinion as to the character of change, when he has not been qualified as an expert on these points, would not be proper; and we object to the testimony being given, and if given, we will move to strike it out; and we may make further objection to it."

(It should be pointed out that Mr. W. W. Turney was of counsel for Texas from the inception of this litigation.)

No objection was thereafter made during the taking of this testimony as to the insufficiency of the pleadings to admit proof of accretion. Thereafter, beginning June 19, 1924, the State of Texas introduced testimony on the question of accretion. (See Record of Additional Testimony, pp. 67-124.)

By special order this Court instructed the Special Master to receive a brief from the *amicus curiae* which would necessarily deal solely with the question of accretion.

This was the state of the record when the parties closed their proof and submitted the case to the Special Master. The first objection raised by the State of Texas that the pleadings were not sufficient to admit proof of accretive changes appears in the Exceptions of the State of Texas to the Report of the Special Master, filed in this Court on December 21, 1926. If this objection had been raised at any prior time it is clear that this Court would certainly have allowed an amendment to the pleadings in order that they might conform to the proof on the subject of accretion which the complainant took under a specific order of this Court. No objection, however, was raised until the case was closed and was before this Court on exceptions from the report of the Special Master. Both parties treated the pleadings as sufficient to admit all necessary proof required to determine the true boundary line.

It should also be pointed out that this Court in its opinion recognized that the general rule is that changes by gradual accretion on a river boundary between two states change the interstate boundary and that this is altered only by a long continued practice to the contrary. No such long continued practice was set up in

any pleading appearing in this case. If, therefore, the pleadings are too narrow to permit proof of changes by accretion, they would also seem to be too narrow to permit proof of a long continued practice which alone causes an exception to the general rules of accretion.

In any event, we respectfully submit that under the facts of this case the Court should, if it considers the pleadings inadequate to permit it to determine questions as to changes in the 1850 river line by accretion, permit an amendment to the pleadings under which it can consider the proof heretofore taken under its express order.

The Rules of Procedure in Original Cases Permit Such an Amendment to the Pleadings.

In the case of *Virginia v. West Virginia*, 234 U. S. 117, this Court permitted the filing of additional pleadings after the opinion of the Court on the merits of the case had been announced. In that case this Court said on page 121:

> "The question then is, Under these conditions ought the permission to file the supplemental answer be granted? We think it must be conceded that in a case between ordinary litigants the application of the ordinary rules of legal procedure would render it impossible, under the circumstances which we have stated, to grant the request. We are of the opinion, however, that such concession ought not to be here controlling. As we have pointed out, in acting in this case from first to last the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between states, involving grave questions of public law, determinable by this court

under the exceptional grant of power conferred upon it by the Constitution, has been the guide by which every step and every conclusion hitherto expressed has been controlled. And we are of the opinion that this guiding principle should not now be lost sight of, to the end that when the case comes ultimately to be finally and irrevocably disposed of, as come ultimately it must, in the absence of agreement between the parties, there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice, after the amplest opportunity to be heard, has in any degree entered into the disposition of the case. This conclusion, which we think is required by the duty owed to the moving state, also in our opinion operates no injustice to the opposing state, since it but affords an additional opportunity to guard against the possibility of error, and thus reach the result most consonant with the honor and dignity of both parties to the controversy."

We, therefore, respectfully submit that the petition for rehearing be granted, and that the State of New Mexico be given an opportunity to amend its pleadings so that there may not be "the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy or that anything but the largest justice, after the amplest opportunity to be heard has in any degree entered into the disposition of the case."

Respectfully submitted,

FRANK W. CLANCY,
THORNTON HARDIE,
J. HARRY COVINGTON,
On Behalf of New Mexico.